Supreme Court, U. S.
FILED
JUN 30 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1980

No. 79-2072

In re:

CHANDOS C. WILLIAMS and JOAN L. WILLIAMS,
Bankrupts.

CHANDOS C. WILLIAMS and JOAN L. WILLIAMS,
Petitioners,

vs.

NEW YORK STATE HIGHER EDUCATION SERVICES CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LACY, KATZEN, JONES & RYEN
Attorneys for Petitioners,
228 Plymouth Avenue South
Rochester, New York 14608
Telephone: (716) 454-5650

Paul S. Groschadl, *of Counsel*

The Daily Record
Rochester, New York

(6149)

Spaulding Law Printing
Syracuse, New York

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes, Federal Rules and Regulations Involved	2
Statement	5
Reasons for Granting the Writ	7
Conclusion	9

APPENDIX

Order of Judge Edward D. Hayes	A-1
Memorandum and Decision of Judge Edward D. Hayes	A-2
Order of Judge Harold P. Burke	A-6
Decision and Order of Court of Appeals Second Circuit	A-8
Order of Judge John T. Curtin	A-21

CITATIONS

Cases: Page

Caminetti v. United States, 242 US 470 (1917) 7

In re Carter, 32 F 2d 186 (2d Cir, 1929). 8

In re C.H. Earle, Inc., 2 F Supp 15 (EDNY, 1932) aff'd 65 F 2d 1013 (2d Cir, 1933) cert. denied 290 US 674 (1933). . . 8

In re Piccione, 5 BCD 1076 (D. Conn, 1979). 8

In re Sawaya, 5 BCD 1072 (D. Mass, 1979) 5

In re Seaholm, 136 F 144 (1st Cir, 1904) 8

In re Sloss, 192 F Supp 136 (SDNY 1961) 8

Iselin v. United States, 270 US 245 (1926) 7

NYSHESC v. Amadori, 5 BCD 187 (WDNY, 1979). 8

United States v. Marxen, 307 US 200 (1939). 8

White v. Stump, 266 US 310 (1924) 8

Statutes and Regulations:

Section 439A of the Higher Education Act of 1965, as amended, 20 U.S.C. §1087-3. 2

Section 317 of Title III of the Bankruptcy Rerform Act of 1978, Pub. L. 95-598 3

Section 523 (a)(8) of the Bankruptcy Code, 11 U.S.C. §523(a)(8) 3

Section 402(a) of Title IV of the Bankruptcy Reform Act of 1978, Pub. L. 95-598. 3

Pub. L. 96-56, enacted August 14, 1979 3

Miscellaneous:

1A Sutherland on Statutory Construction 23.07, p. 219 (4th Ed., 1973). 7

In The

Supreme Court of the United States

October Term, 1980

No.

In re:

CHANDOS C. WILLIAMS and JOAN L. WILLIAMS,
Bankrupts.

CHANDOS C. WILLIAMS and JOAN L. WILLIAMS,
Petitioners,

vs.

NEW YORK STATE HIGHER EDUCATION SERVICES CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners request that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in this case on April 16, 1980.

OPINIONS BELOW

The opinion of the United States Bankruptcy Court for the Western District of New York is reported at 20 CBC 194. The opinion of the District Court is unreported. The opinion of the Court of Appeals for the Second Circuit is reported at ____ F 2d ____.

JURISDICTION

The order of the Court of Appeals for the Second Circuit was made and entered on April 16, 1980, and copies are appended to this petition in the Appendix at p. A-8. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The following questions are presented for review:

1. What is the effect of the repeal by Congress of Section 439A of the Higher Education Act of 1965, as amended 20 U.S.C. § 1087-3? The Court of Appeals, in a holding admittedly contrary to the plain language of the applicable legislation, held that the repeal is of no effect on grounds of legislative error.

2. Did the Bankruptcy Court correctly apply the law governing discharge in effect on the date of its determination, or was it required to apply the law in effect on either the date the bankruptcy petitions were filed or the date of entry of the order of discharge in the bankruptcy proceedings?

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

The following statutes are involved in this case:

1. Section 439A of the Higher Education Act of 1965, as amended, 20 U.S.C. §1087-3:

> (a) A debt which is a loan insured or guaranteed under the authority of this part may be released by a discharge in bankruptcy under the Bankruptcy Act only if such discharge is granted after the five-year period (exclusive of any applicable suspension of the repayment period) beginning on the date of commencement of the repayment period of such loan, except that prior to the expiration of that five-year period, such loan may be released only if the court in which the proceeding is pend-

ing determines that payment from future income or other wealth will impose an undue hardship on the debtor or his dependents.

(b) Subsection (a) of this section shall be effective with respect to any proceedings begun under the Bankruptcy Act on or after September 30, 1977.

2. Section 317 of Title III of the Bankruptcy Reform Act of 1978, Pub. L. 95-598:

Section 439 A of Part B of Title IV of the Higher Education Act of 1965 (20 U.S.C. 1087-3) is repealed.

3. Section 523 (a) (8) of the Bankruptcy Code, 11 U.S.C. § 523 (a) (8):

A discharge under section 727, 1141, or 1328 (b) of this title does not discharge an individual debtor from any debt —

(8) for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution of higher education, unless —

(a) such loan first become due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(b) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

4. Section 402(a) of Title IV of the Bankruptcy Reform Act of 1978, Pub. L. 95-598:

Except as otherwise provided in this title, this Act shall take effect on October 1, 1979.

5. Pub. L. 95-56, enacted August 14, 1979:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

assembled, That section 17a of the Bankruptcy Act (11 U.S.C. 35(a)) is amended —

(1) by striking out "or" at the end of clause (7); and

(2) by striking out the period at the end of clause (8) and inserting in lieu thereof: "or; (9) for a loan insured or guaranteed under the authority of part B of title IV of the Higher Education Act of 1965 (20 U.S.C. 1071 et seq.) unless (a) the discharge is granted after the five-year period (exclusive of any applicable suspension of the repayment period) beginning on the date of commencement of the repayment period of such loan, or (b) the discharge is granted prior to the expiration of such five-year period and the court determines that payment from future income or wealth will impose an undue hardship on the bankrupt or his dependents.".

SEC. 2. The amendments made by section 1 shall apply with respect to any proceeding commenced under the Bankruptcy Act during the period beginning on the date of enactment of this Act and ending October 1, 1979.

SEC. 3. Section 523 (a) (8) of title 11, United States Code, as enacted by section 101 of Public Law 95-598, is amended —

(1) by striking out "to a governmental unit, or a nonprofit institution of higher education, for an educational loan" and inserting instead "for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution of higher education"; and

(2) in subparagraph (A), by inserting "(exclusive of any applicable suspension of the repayment period)" after "before five years".

STATEMENT

On May 10, 1978, the petitioners filed separate petitions in bankruptcy in the United States District Court for the Western District of New York. Each petition listed loans guaranteed by the respondent and reinsured by the United States Office of Education, commonly referred to as "student loans." As such, the dischargeability of the loans in bankruptcy was limited by 20 U.S.C. § 1087-3. On August 22, 1978, the petitioners received their discharge from debts dischargeable under Section 17 of the Bankruptcy Act by order of the Bankruptcy Court.

On September 11, 1978, the Court issued summonses to the petitioners on the complaints filed by respondent to determine the dischargeability of the student loans pursuant to 20 U.S.C. § 1087-3. On November 6, 1978, while these proceedings were pending, 20 U.S.C. § 1087-3 was repealed upon the enactment of Section 317 of the Bankruptcy Reform Act of 1978, Pub. L. 95-598. Section 523 (a) (8) of Title II of the Reform Act contains limitations similar to those contained in 20 U.S.C. § 1087-3, but by reason of Section 402 (a) of Title IV of the Reform Act, Section 523 (a) (8) was not made effective until October 1, 1979. Thus, there existed a period of approximately eleven months in which no limitation existed with regard to the dischargeability of student loans in bankruptcy.

Corrective legislation came before Congress in the Summer of 1979, and on August 14, 1979, both Houses of Congress approved Pub. L. 96-56 by voice vote. Pub. L. 96-56 reactivated 20 U.S.C. § 1087-3 between August 14, 1979 and October 1, 1979, but it is important to note that Pub. L. 96-56 did nothing to change the absence of limitations on the dischargeability of student loans between November 6, 1978 and August 14, 1979. At least one Bankruptcy Court has already interpreted Pub. L. 96-56 as indicative of Congressional intent *not* to limit the dischargeability of student loans between November 6, 1978 and August 14, 1979; *In re Sawaya*, 5 BCD 1072 (D. Mass, 1979).

It was during this period between November 6, 1978 and August 14, 1979 that Bankruptcy Judge Edward D. Hayes of the Western District of New York rendered his decision in these cases. Applying the law in effect on the date that Bankruptcy Court determines the issue of discharge, as Judge Hayes was required to do by the authorities cited in his decision, the Court held on March 19, 1979 that the student loans were dischargeable due to the absence of any provision denying discharge. The District Court affirmed the Bankruptcy Court by order dated September 27, 1979 and the respondent thereafter appealed to the United States Court of Appeals for the Second Circuit.

The Court of Appeals reversed the District Court and remanded to the Bankruptcy Court for further proceedings. It held that, despite the plain and unambiguous wording of the statute, the repeal of 20 U.S.C. § 1087-3 was a mistake and that, as a result, the Court would treat the repeal as of no effect. Because of this holding, the Court of Appeals did not reach respondent's contention that the Bankruptcy Court should have applied the law in effect on May 10, 1978, the date the petitions were filed.

REASONS FOR GRANTING THE WRIT

This petition raises substantial and important questions with regard to judicial construction of federal statutes.

1. The Court of Appeals interpreted plain and unambiguous federal statutes in a manner contrary to their plain and unambiguous meaning. Such statutory construction is unprecedented and in conflict with applicable decisions of this Court. In *Iselin v. United States*, 270 US 245, 250 (1926) Justice Brandeis stated:

> (The statute) ... is plain and unambiguous. What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the Court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.

In *Caminetti v. United States*, 242 US 470, 485 (1917), this Court said:

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms (citations omitted).

The function of the judiciary is to apply unambiguous federal statutes as written by the legislative branch of government. In a case such as this, where the repealing statute is clearly stated, the courts have no responsibility or authority but to apply the legislative will as expressed in the statute; 1A Sutherland on Statutory Construction 23.07, p. 219 (4th Ed., 1973). It is respectfully submitted that the Court of Appeals exceeded its authority and exercised powers reserved to the legislature in attempting to correct a perceived legislative error.

2. Although not reached by the Court of Appeals, this petition presents the important federal question of whether bankruptcy courts should apply the law in effect on the date of decision, the

law in effect on the date of entry of an order of discharge, or the law in effect on the date that a petition for relief is filed in bankruptcy court in determining issues of discharge. The Bankruptcy Court in this case applied the law in effect on the date of its decision, relying upon *In re Carter*, 32 F 2d 186 (2d Cir, 1929), *In re Seaholm*, 136 F 144 (1st Cir, 1904) and *In re Sloss*, 192 F Supp 136 (SDNY, 1961). The respondent has argued that the Bankruptcy Court should have applied either the law in effect on the date of the petition, citing *White v. Stump*, 266 US 310 (1924), *In re C.H. Earle, Inc.*, 2 F Supp 15 (EDNY, 1932), aff'd 65 F 2d 1013 (2d Cir, 1933), cert. denied 290 US 674 (1933), and *United States v. Marxen*, 307 US 200 (1939), all of which deal with bankruptcy questions other than discharge, or the law in effect on the date of entry of an order of discharge, citing *NYSHESC v. Amadori*, 5 BCD 187 (WDNY, 1979); see also *In re Piccione*, 5 BCD 1076 (D. Conn, 1979).

3. Although no other Court of Appeals has ruled directly upon the issue presented by this petition at the date it is drafted, the potential for conflict among the circuits exists and it is entirely possible that a conflict may exist at the time that the Court rules upon this petition. The results reached by the many courts that have recently decided the questions presented by this petition are as varied as the possibilities. Bankruptcy judges throughout the country who specialize in these matters are in irreconcilable conflict, as evidenced by their decisions. Some of the cases are set forth in the decision of the Court of Appeals in this case (appendix, pp. A-8-20).

Furthermore, unless this Court exercises its discretion to grant a writ of certiorari in this case, it is likely that the confusion engendered by the decisions to date will only be compounded over a period of time. The Bankruptcy Reform Act sets no time limit for initiation of cases to determine the dischargeability of student loans. Nor does it limit such contests to the bankruptcy courts; they may arise in other federal and state courts as well. Thus, the direction of this Court is necessary so

that these important federal questions will be decided correctly in the future.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

LACY, KATZEN, JONES & RYEN
Attorneys for Petitioners,
228 Plymouth Avenue South
Rochester, New York 14608
Telephone: (716) 454-5650

Paul S. Groschadl, *of Counsel*

APPENDIX

ORDER OF JUDGE EDWARD D. HAYES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter of	In Bankruptcy
PAUL R. ADAMO	NO. B-78-1033
BARBARA ANN BARRINGTON	B-77-2795
RAYMOND A. BRIMACOMB	B-78-1599
MICHAEL S. DEMPSEY	B-78-18
PAUL M. GAGNON	B-78-1974
ELOISE HYMES	B-78-1209
PAMELA R. JURICH	B-77-3174
LEOMIA R. LINTON	B-78-1435
KENNETH W. LOCEY, JR.	B-78-933
DEBORAH PETERS MANCUSO	B-78-1349
DIANNE K. MAYO	B-77-2661
DENISE K. MUNNINGS	B-78-1164
KAREN NIELSEN	B-78-1898
CHANDOS C. WILLIAMS	B-78-1128
JOAN L. WILLIAMS	B-78-1129
RAYMOND T. WRIGHT, JR.,	B-78-1962

Bankrupts

NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Plaintiff

vs.

ABOVE NAMED,

Defendants.

ORDER

At Rochester, New York in the said District on the 16th day of March, 1979.

In accordance with the Memorandum and Decision to be attached hereto it is hereby

ORDERED that the debts of the above named bankrupts to New York Higher Education Services Corporation are discharged.

/s/ EDWARD D. HAYES
Edward D. Hayes
Bankruptcy Judge

ENTER:

MEMORANDUM AND DECISION OF JUDGE EDWARD D. HAYES

(SAME TITLE)

MEMORANDUM AND DECISION

These matters arose out of the repeal on November 6, 1978 of 20 USC Section 1087-3 by the Bankruptcy Reform Act of 1978, (Public Law 95-508) and the subsequent enactment under 423(8) of said law of a provision making nondischargeable except in cases of undue hardship all federally guaranteed student loans less than five years old at the filing of the petition in bankruptcy. This latter statute becomes effective October 1, 1979. Because of the gap, this Court, on its own motion, raised the issue of whether it now had jurisdiction to hear the subject cases, a hearing was held. All parties were permitted to offer whatever proof they had and to file briefs in regard to the dischargeability of the student loans. This has been done and the matter has been submitted for decision.

The facts are not in dispute 20 USC 1087-3 was repealed effective November 6, 1978 by Public Law 95-598. The new section, corresponding to it, does not go into effect until October 1, 1979.

All of the cases involved in this decision involve cases that were filed between the effective date of 20 USC Section 1087-3 (September 30, 1977) and the effective date of Public Law 95-598 (November 6, 1978). They are in various stages of resolution. Some have been pre-tried; some have been tried; but in none has the Court made a decision as of November 6, 1978.

The law applicable to this matter, 1 USC 109 provides in part as follows:

> "The repeal of any statute shall not have the effect to release or extinguish *any penalty, forfeiture, or liability* incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of *such penalty, forfeiture, or liability . . .*"*

The State argues that the above quoted section of 1 USC 109 saves their cause of action. You will note, however, that their cause of action is saved only if it is "penalty, forfeiture, or liability." 20 USC 1087-3 gives the Bankruptcy Court jurisdiction to grant a remedy to certain creditors under certain circumstances and this does not create a penalty, forfeiture or liability in this Court's opinion. The liability was created by the note given at the time of the Student Loan. The Bankruptcy Act made that loan dischargeable till the enactment of 20 USC 1087-3, which removed the remedy of discharge under certain circumstances. Congress by the enactment of Public Law 95-598 has merely removed that remedy and the jurisdiction of the Bankruptcy Court or any Court to determine the nondischargeability of Student Loans. See Bruner vs. United States (343 US 112) where the Supreme Court at page 117 says:

> ". . . This case is not affected by the so-called general savings statute which provides that "repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such

> statute." Congress has not altered the nature or validity of petitioner's rights or the Government's liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities. Hallowell v. Commons, 239 US 506, 508 (1916). Compare Lynch v. United States, 292 US 571 (1934).
>
> Under the Judicial Code, as amended by the Act of October 31, 1951, the jurisdiction of the District Court does not extend to actions for compensation brought by either "Officers" or "employees" of the United States. Since we find that Act applicable to petitioner's action, the judgment of the District Court dismissing petitioner's complaint for want of jurisdiction is correct . . ."

The State also argues that Section 403 of Public Law 95-598 saves their cause of action. But it will be noted that Section 402 of Public Law 95-598 makes Section 403 effective only on October 1, 1979.

In the cases which this Court has heard under Title 20 USC 1087-3, when the issue has been raised that the bankrupt was entitled to rectrospective application of the Bankruptcy Law to the time that the debt was first contracted, the bankrupts were met by the State's arguement to the effect that the law that governs the discharge is that which is in effect at the time that the issue of discharge is determined.

In re Carter (32F 2nd 186) the Court says at page 188:

> ". . . The Circuit Court of Appeals for the Fourth Circuit, in construing the amendment to the Bankruptcy Act in 1926, held that the grounds which would bar a discharge were determined by the law in force at the time the judge passed on the question of discharge, and not by the law in force at the time of filing the petition in bankruptcy. Lockhart v. Edel, 23 F. (2d) 912 . . ."

Other cases which hold the same are In re Seaholm 136F 144 and In re Sloss 192 FS 136. Therefore, I cannot see how the State, who sets these cases forth in their brief, can now argue that the

law that existed on the date of the filing of the petition in bankruptcy is the law that governs the discharge of the bankrupt. The cases clearly hold otherwise.

As a result of the foregoing this Court finds that it no longer has jurisdiction to determine that the subject bankrupts are not entitled to a discharge, since the law which exists at the time of this decision has no provision for the denial of the discharge of student loans. Therefore, these loans are dischargeable and it is so ordered.

This Memorandum and Decision shall constitute Findings of Fact and Conclusions of Law in accordance with Rule 752 of the Rules of Bankruptcy Procedure.

/s/ EDWARD D. HAYES
Edward D. Hayes
Bankruptcy Judge

Dated: March 19, 1979

ORDER OF JUDGE HAROLD P. BURKE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter of

PAUL R. ADAMO	BK-78-1032
BARBARA ANN BARRINGTON	BK-77-2795
RAYMOND A. BRIMACOMB	BK-78-1599
MICHAEL S. DEMPSEY	BK-78-18
PAUL M. GAGNON	BK-78-1974
ELOISE HYMES	BK-78-1209
PAMELA R. JURICH	BK-77-3174
LEOMIA R. LINTON	BK-78-1435
KENNETH W. LOCEY, JR.	BK-78-933
DEBORAH PETERS MANCUSO	BK-78-1349
DIANNE K. MAYO	BK-77-2661
DENNIS K. MUNNINGS	BK-78-1164
KAREN NEILSEN	BK-78-1898
CHANDOS C. WILLIAMS	BK-78-1128
JOAN L. WILLIAMS	BK-78-1129
RAYMOND T. WRIGHT, JR.	BK-78-1962
MARICA LEE CHRISTOPHER	BK-78-2184
PHILLIP NORTON	BK-78-2405
DONALD SALAMONE	BK-78-2273
KAREN STANLEY	BK-78-2296
WILLIAM EDWARDS,	BK-78-1082

Bankrupts

NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Plaintiff

vs.

ABOVE NAMED,

Defendants

Order of Judge Harold P. Burke

Hearing on appeal of all of the above named defendants on June 11, 1979 from two orders of Edward J. Hayes, Bankruptcy Judge, entered March 19, 1979 and April 15, 1979. These orders, accompanied by memorandum and decision, discharged the student loans of the various defendants herein and held that 20 U.S.C. Section 1087-3 no longer makes these loans non-dischargeable in bankruptcy.

In his orders, Judge Hayes concluded that 20 U.S.C. 1087-3 had been repealed by the Bankruptcy Reform Act.

The Bankruptcy Reform Act was enacted on November 6, 1978. In the Act, Congress reaffirmed its intention to afford special treatment and consideration in bankruptcy proceedings to student loans which are made pursuant to government insurance provisions. Thus, the Act contains provisions which are quite similar to 20 U.S.C. Section 1087-3, namely Section 523 (a) (8), "Exceptions to Discharge". This section, like much of the remainder of the Bankruptcy Reform Act is to become effective on October 1, 1979. However, the repeal of 20 U.S.C. Section 1087-3 (pursuant to Sections 317 and 402 (d) of the Act) was to become effective immediately upon enactment of the Act. On due consideration it is hereby

ORDERED that the two orders of Edward D. Hayes, Bankruptcy Judge, entered March 19, 1979 and April 5, 1979 are in all respects affirmed.

/s/ HAROLD P. BURKE
Harold P. Burke
United States District Judge

September 27, 1979.

DECISION AND ORDER OF COURT OF APPEALS SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 813 — September Term, 1979.

(Submitted March 14, 1980 Decided April 16, 1980.)

Docket No. 79-5059

In re:

PAUL R. ADAMO
BARBARA ANN BARRINGTON
RAYMOND A. BRIMACOMB
MICHAEL S. DEMPSEY
PAUL M. GAGNON
ELOISE HYMES
PAMELA R. JURICH
LEOMIA LINTON
KENNETH W. LOCEY, JR.
DEBORAH PETERS MANCUSO
DIANE K. MAYO
DENISE K. MUNNINGS
KAREN NIELSEN
CHANDOS C. WILLIAMS
JOAN L. WILLIAMS
RAYMOND T. WRIGHT, JR.
MARCIA LEE CHRISTOPHER
PHILLIP LEE NORTON
DONALD J. SALAMONE
KAREN STANLEY
WILLIAM M. EDWARDS

Decision and Order of Court of Appeals, Second Circuit

NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Appellant,

—v.—

ABOVE NAMED,

Appellees.

Before:

LUMBARD and MANSFIELD, *Circuit Judges*
and BARTELS, *District Judge.**

Appeal from a judgment of the United States District Court for the Western District of New York, Burke, *J.*, affirming the discharge by the Bankruptcy Court of certain student loan obligations in proceedings brought on by twenty-one voluntary petitions in bankruptcy.

Reversed.

LAWRENCE W. O'TOOLE, ESQ., Albany, N.Y.,
for Appellant.

BARTELS, *District Judge:*

This is an appeal from a judgment of the United States District Court for the Western District of New York, Burke, *J.*, affirming the discharge by the Bankruptcy Court of certain student loan obligations in proceedings brought on by twenty-

*Of the United States District Court for the Eastern District of New York, sitting by designation.

one voluntary petitions in bankruptcy.[1] The sole question for review is the effect of the repeal by Congress of Section 439A of the Higher Education Act of 1965, as amended, 20 U.S.C. § 1087-3, pertaining to dischargeability of student loans, on petitions in bankruptcy commenced but not disposed of prior to the date of such repeal.

The pertinent facts are undisputed. Each of the loans here involved is either owed to or guaranteed by appellant New York State Higher Education Services Corporation ("NYSHESC"), and each was reinsured to appellant by the United States Office of Education by agreements entered into pursuant to the Higher Education Act of 1965, as amended, 20 U.S.C. §§ 1071 *et seq.* At the time the twenty-one voluntary petitions in bankruptcy were filed, § 1087-3 of Title 20 provided, in part, as follows:

> (a) A debt which is a loan insured or guaranteed under the authority of this part may be released by a discharge in bankruptcy under the Bankruptcy Act only if such discharge is granted after the five-year period ... beginning on the date of commencement of the repayment period of such loan, except that prior to the expiration of that five-year period, such loan may be released only if the court in which the proceeding is pending determines that payment from future income or other wealth will impose an undue hardship on the debtor or his dependents.
>
> (b) Subsection (a) of this section shall be effective with respect to any proceedings begun under the Bankruptcy Act on or after September 30, 1977.

---

[1]The twenty-one petitioners in bankruptcy involved in this action are Paul R. Adamo, Barbara Ann Barrington, Raymond A. Brimacomb, Michael S. Dempsey, Paul M. Gagnon, Eloise Hymes, Pamela R. Jurich, Leomia Linton, Kenneth W. Locey, Jr., Deborah Peters Mancuso, Diane K. Mayo, Denise K. Munnings, Karen Nielsen, Chandos C. Williams, Joan L. Williams, Raymond T. Wright, Jr., Marcia Lee Christopher, Phillip Lee Norton, Donald J. Salamone, Karen Stanley, and William M. Edwards. Each petition was filed between October 9, 1977 and October 2, 1978.

This provision was subsequently repealed effective November 6, 1978, however, by Section 317 of the Bankruptcy Reform Act of 1978 ("BRA"), Pub.L. 95-598,[2] and was replaced by an analogous section, 11 U.S.C. § 523(a)(8). Broader in scope than 20 U.S.C. § 1087-3, section 523(a)(8), as amended by Pub.L. 96-56, provides:

> (a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> • • •
>
> (8) for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution of higher education, unless —
>
> (A) such loan first became due before five years ... before the date of the filing of the petition; or
>
> (B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents; ...

Under section 402(a) of the BRA, this replacement provision did not become effective until October 1, 1979, approximately eleven months after the effective date of the repeal of its predecessor, 20 U.S.C. § 1087-3.[3] According to appellant, this interruption in the rule of nondischargeability of student loans constitutes a loop-

---

[2]Section 317 of the Bankruptcy Reform Act of 1978 ("BRA") provides that "Section 439A of part B of title IV of the Higher Education Act of 1965 (20 U.S.C. 1087-3) is repealed." The effective date of this section appears in section 402(d) of the BRA, which provides that "[t]he amendments made by sections 217, 218, 230, 247, 302, 314(j), 317, 327, 328, 338, and 411 of this Act shall take effect on the date of enactment of this Act."

[3]Section 402(a) of the BRA provides that "[e]xcept as otherwise provided in this title, this Act shall take effect on October 1, 1979."

hole through which certain student loan debtors now attempt to escape their repayment obligations.

The Bankruptcy Court disposed of all of the twenty-one petitions by two identical memorandum decisions and orders dated March 16 and April 5, 1979, respectively, holding that because the petitions were considered and resolved after the repeal of 20 U.S.C. § 1087-3 but before the effective date of 11 U.S.C. § 523(a)(8), that Bankruptcy Court no longer had jurisdiction "to determine that the subject bankrupts are not entitled to a discharge, since the law which exists at the time of this decision has no provision for the denial of the discharge of student loans." Accordingly, Bankruptcy Judge Hayes ordered that the student loan debts in question be discharged. His decision was affirmed by the district court in a brief order on September 27, 1979, and this appeal followed.

The question presented by this appeal has been considered previously on numerous occasions by many different bankruptcy courts, and at least ten of these have concluded, along with Judge Hayes in this case, that discharge should be ordered. *See In re Utterback; Wisconsin Higher Educational Aids Board v. Utterback*, 5 B.C.D. 1046 (N.D.Tex. 1979); *In re Sawaya; Massachusetts Higher Education Assistance Corporation v. Sawaya*, 5 B.C.D. 1072 (D.Mass. 1979); *In re King, Jr.; State of Ohio v. King, Jr.*, 5 B.C.D. 417 (S.D.Ohio 1979); *In re Johnson; Pennsylvania Higher Education Assistance Agency v. Johnson*, 5 B.C.D. 532 (E.D. Pa. 1979); *In re Jones; University of Cincinnati v. Jones*, No. B-1-1804 (S.D.Ohio 1979); *In re Matthews; Matthews v. Connecticut Student Loan Foundation*, [1979] Bankr.L.Rep. (C.C.H.) ¶67,049 (D.Conn. 1979); *In re Adams; Connecticut Student Loan Foundation v. Adams*, No. H-78-647 (D.Conn. 1979); *In re Christopher; New York State Higher Education Services Corporation v. Christopher, et al.*, 5 B.C.D. 214 (W.D.N.Y. 1979); *In re Espronceda; Coordinating Board, Texas College and University System v. Espronceda*, 5 B.C.D. 267

(S.D.Tex. 1979); *see also In re Amadori; New York State Higher Education Services Corporation v. Amadori, et al.*, 5 B.C.D. 187 (W.D.N.Y. 1979). On the other hand, an equal number of courts have concluded that the repeal of 20 U.S.C. § 1087-3 was of no effect with regard to cases commenced prior to the effective date of the BRA, October 1, 1979, and have denied the petitions for discharge in bankruptcy of otherwise nondischargeable student loan debts on that basis. *See In re Henry; New York State Higher Education Services Corporation v. Henry*, 5 B.C.D. 1014 (S.D.N.Y. 1979); *In re Erickson; Wisconsin Higher Educational Aids Board v. Erickson*, 5 B.C.D. 734 (E.D.Wis. 1979); *In re Weinstein; Pennsylvania Higher Education Assistance Agency v. Weinstein*, 5 B.C.D. 503 (E.D.Pa. 1979); *In re Kohn; New York State Higher Education Services Corporation v. Kohn*, 5 B.C.D. 419 (S.D.N.Y. 1979); *In re Edson; Wisconsin Higher Educational Aids Board v. Edson*, 4 B.C.D. 1191 (D.Nev. 1979); *In re Perkins; New York State Higher Education Services Corporation v. Perkins*, No. B-78-00749 (D.Utah 1979); *see also In re Garetano; New York State Higher Education Services Corporation v. Garetano*, 79-C-953, 78-B-780 (E.D.N.Y. 1979); *In re Markovitz; New York State Higher Education Services Corporation v. Markovitz*, CA-79-P-0576-S, B-78-01230 (N.D. Ala. 1979); *In re Hawes, et al. v. New Jersey Higher Education Assistance Agency*, No. B78-28 (D.N.J. 1979).

For the reasons hereafter set forth, we believe that the latter decisions have correctly interpreted the relevant provisions of the BRA. We conclude that the hiatus between the repeal of section 1087-e of Title 20 and the effective date of its successor provision, 11 U.S.C. § 523(a)(8), was purely a manifestation of congressional inadvertence and that to follow blindly the plain meaning of the statute without regard to the obvious intention of Congress would create an absurd result in accord with neither established principles of statutory construction nor common sense. Accordingly, the decisions of the district court and the bankruptcy court below must be reversed.

Analysis of the legislative history of the BRA supports appellant's contention that the failure of the effective dates of the repeal and replacement statutes to coincide resulted from a mistake of Congress.[4] Section 1087-3 of Title 20 of the United States Code was enacted in 1976 to prevent abuse of the bankruptcy laws by students petitioning for bankruptcy immediately upon graduation without attempting to realize the potential increased earning capacity which education may provide. *H.Rep. No. 94-1232*, 94th Cong., 2d Sess., 1 (1976); *see also* Report of the Commission on the Bankruptcy Laws of the United States, *H.R.Doc. No. 93-137*, 93rd Cong., 1st Sess., 176-77 (1973), *reprinted in* L. King (ed.), Collier on Bankruptcy, app.v.2, 176-77 (15th ed. 1979). By creating a special exception from discharge for educational loans, Congress hoped to insure a more realistic view of a student's ability to repay the debt.

During the 95th Congress, however, bankruptcy reform legislation was introduced in the House of Representatives which included the repeal of section 1087-3 in order to "restore the law to where it had been before the 1976 amendment . . ." *H.Rep. 95-595*, 95th Cong., 1st Sess., 132, *reprinted in* [1979] U.S. Code Cong. & Admin. News, p. 6093.[5] This repeal provision, which was to take effect on the date of enactment of the legislation, was predicated upon the view that student abuses were not as widespread as had been thought and, therefore, did not warrant

---

[4]Only a brief overview of the legislative history of the relevant sections of the BRA is included here. For more detailed analysis, *see In re Edson; Wisconsin Higher Educational Aids Board v. Edson*, 4 B.C.D. 1191 (D.Nev. 1979); *In re Kohn; New York State Higher Education Services Corporation v. Kohn*, 5 B.C.D. 419 (S.D.N.Y. 1979); *In re Johnson; Pennsylvania Higher Education Assistance Agency v. Johnson*, 5 B.C.D. 532 (E.D.Pa. 1979); L. King (ed), Collier on Bankruptcy, v. 3, ¶ 523.18 (15th ed. 1979).

[5]The basis for the House Judiciary Committee's conclusion is extensively set forth at pp. 132-62 of its Report No. 95-595, *reprinted in* [1978] U.S. Code Cong. & Admin. News, pp. 6093-123.

special treatment under the bankruptcy laws. This sentiment did not prevail, however, and when the legislation — H.R. 8200 — was reintroduced for further consideration in early 1978, the House, by amendment to section 523(a)(8) of the bill, adopted a replacement provision making nondischargeable educational loans insured or guaranteed under Part B of Title IV of the Higher Education Act of 1965, *supra*.[6]

Similar bankruptcy reform legislation was introduced in the Senate in October 1977 as S. 2266. While § 316 of S. 2266 also provided for the repeal of 20 U.S.C. § 1087-3, the bill contained a more comprehensive replacement provision in section 523(a)(8) excepting from discharge any debt for an educational loan. The effective date of both sections 316 and 523(a)(8) was October 1, 1979.

The differences between the House and Senate versions of the relevant provisions were resolved by the conference committee in September 1978. Because the Senate members would not acquiesce to the limited nondischargeability provision contained in H.R. 8200, the committee amended the House bill by broadening the scope of section 523(a)(8) to make nondischargeable all educational loans owing to or insured or guaranteed by a governmental unit or a nonprofit institution of higher education. The committee failed, however, to notice that the section repealing 20 U.S.C. § 1087-3 as of the date of enactment remained in the House bill. Thus, as subsequently approved by Congress and signed into law by the President, the BRA contained the House repeal provision and, due to the insistence of the Senate conferees, a broad replacement provision, the effective dates of which did not coincide. There is no indication in the history of the BRA that Congress intended to legislate such an in-

---

[6]House consideration of the amendment, including its text and the floor debate preceding its approval, appears at 124 *Cong. Rec.* H466-472 (daily ed. Feb. 1, 1978).

consistency or that it sought for some unexpressed reason to create an approximately eleven-month hiatus for the benefit of student loan debtors.

The inadvertence of this action was subsequently acknowledged by the Senate Committee on the Judiciary in its report issued in connection with corrective legislation enacted as Public Law 96-56 on August 14, 1979. In *S.Rep. No. 96-230,* 96th Cong., 2d Sess., 2-3, *reprinted in* [1979] U.S. Code Cong. & Admin. News, pp. 1883-84, the Committee explained the legislation's purpose:

> The gap in coverage of a prohibition on the discharge in bankruptcy of loans made under the Guaranteed Student Loan Program resulting from the early repeal of section 349A (sic) is very undesirable and totally inadvertent. Accordingly, section 1 of the bill revises the intent of section 439A to maintain the status quo until such time as 11 U.S.C. 523(a)(8) becomes effective.
>
> * * *
>
> Section 1 of the bill (H.R. 2807) closes the inadvertent "gap" created when the applicable section of the Higher Education Act of 1965 prohibiting discharge of student loans was repealed as of November 6, 1978, and its replacement section in Title II was not made effective until October 1, 1979. Congress obviously did not mean to create a gap and at all times held to the principle of non-dischargeability of student loans . . ."

---

[7]Section one of Pub.L. 96-56 adds to the old Bankruptcy Act the exception to discharge language which prior to its repeal had been codified as 20 U.S.C. § 1087-3. Section two of Pub.L. 96-56 provides that "[t]he amendments made by section 1 shall apply with respect to any proceeding commenced under the Bankruptcy Act during the period beginning on the date of enactment of this Act (August 14, 1979) and ending October 1, 1979."

The bill was approved by both Houses of Congress by voice vote. The remarks of various members of Congress in support of the bill, either by

Footnote continued on next page—

Although such an interpretation by a subsequent Congress is not necessarily controlling, it may be useful in determining the intention of an earlier Congress. *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 90, 79 S.Ct. 141, 145 (1958); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 175 (2d Cir. 1967), *cert. denied*, 390 U.S. 956, 88 S.Ct. 1038 (1968); *Esquire, Inc. v. Ringer*, 591 F.2d 796, 803 (D.C.Cir. 1978), *cert. denied*, ____ U.S. ____, 99 S.Ct. 1217 (1979).

The language of the BRA gives further credence to this interpretation. In addition to the obvious significance of the inclusion of a more comprehensive exception provision in section 523(a)(8) of the BRA than had existed previously in section 1087-3 of Title 20 U.S.C., the BRA also includes a "savings" provision in section 403(a) which preserves the substantive rights of the parties to actions commenced prior to the effective date of the BRA. Section 403(a) provides as follows:

—*Footnote continued from preceding page*

floor speech prior to passage or by insertion in the *Congressional Record*, confirm the conclusion of the Senate Judiciary Committee quoted above. Senator DeConcini (D. Ariz.), principal sponsor and floor manager for the BRA in the Senate, explained the intent of Congress with respect to both the BRA and the correcting legislation:

> Mr. President, the passage of H.R. 2807 will correct an error found in Public Law 95-598, the Bankruptcy Reform Act, that inadvertently created a "gap" in provisions of existing law concerning nondischargeability of student loans in a bankruptcy case. Public Law 95-598 repealed provisions in the Higher Education Act making student loans nondischargeable. It was the intent to merely shift the location of the nondischargeability provision from the Higher Education Act to the Bankruptcy Code, 11 U.S.C. However, . . . a "gap" was created between November 6, 1978, and October 1, 1979, when it can be argued that there is no nondischargeability provision in the law although it clearly was not the intent of Congress to have created such a gap.

125 *Cong. Rec.* S9160 (daily ed. July 11, 1979). For statements by other members of Congress, *see* 125 *Cong. Rec.* H2758-60 (daily ed. May 7, 1979).

> A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter or proceeding shall continue to be governed by the law applicable to such case, matter or proceeding as if the Act had not been enacted.

Because this section, together with the BRA as a whole, did not become effective until October 1, 1979, it is not dispositive of this appeal. However, we consider it persuasive evidence of Congress' desire not to impair the rights of parties to actions commenced under the old Bankruptcy Act.[8]

Finally, we note the apparent absurdity of a construction of the BRA which, for no discernible reason, would permit the discharge of student loans by debtors who, by sheer chance, have their bankruptcy petitions adjudicated during the eleven-month gap. Both before and after this period, nondischargeability has

---

[8]In its Report accompanying S.2266, the Senate Judiciary Committee confirms that the provisions of the BRA are not to affect actions commenced under prior law. In *S.Rep.No. 95-989*, 95th Cong., 2d Sess., 166 (1978), *reprinted in* [1978] U.S. Cong. & Admin. News, p. 5952, the Committee states:

> Subsection (a) makes clear that the provisions of this act are not to affect cases commenced under prior law, which are to proceed with respect to both substantive and procedural matters, in the same fashion as though this act were not in effect.

The House Judiciary Committee expresses a similar understanding with respect to the analogous provision in H.R. 8200:

> The new law will not affect cases commended (sic) under the old law. Those cases will proceed as though this Act did not take effect. The section applies to substantive as well as procedural matters, to matters governed by Federal bankruptcy law as well as matters governed by State law.

H.Rep. No. 95-595, 95th Cong., 1st sess., 459 (1977), *reprinted in* [1978] U.S. Code Cong. & Admin. News, pp. 6414-15.

been and will continue to be the rule; absent an explicit statement of intent by Congress to provide a period of "amnesty" for student loan debtors, to recognize the repeal of section 1087-3 before giving effect to either section 523(a)(8) of the BRA or the savings provision in section 403(a) would, it seems to us, effectuate a legislative mistake prejudicial to the substantive rights of appellant.

The result of an obvious mistake should not be enforced, particularly when it "overrides common sense and evident statutory purpose." *United States v. Babcock*, 530 F.2d 1051, 1053 (D.C.Cir. 1976); *United States v. Brown*, 333 U.S. 18, 26, 68 S.Ct. 376, 380 (1948). It is a well established principle of statutory construction that a statute should not be applied strictly in accord with its literal meaning where to do so would pervert its manifest purpose. Nowhere has this principle been expressed more eloquently than by Judge Learned Hand in his concurring opinion in *Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944), where he stated:

> There is no surer way to misread any document than to read it literally; in every interpretation we must pass between Scylla and Charybdis; and I certainly do not wish to add to the barrels of ink that have been spent in logging the route. As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and, although their words are by far the most decisive evidence of what they would have done, they are by no means final.

See also Peter Pan Fabrics, Inc. v. Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960); *Federal Deposit Insurance Corp. v. Tremaine*, 133 F.2d 827, 830 (2d Cir. 1943).

In this case, a literal application of the effective date of section 317 of the BRA, repealing 20 U.S.C. § 1087-3, would require us to

disregard its intended purpose.[9] We hold, therefore, that the premature repeal of section 1087-3 is of no effect with respect to proceedings commenced prior to the effective date of the BRA on October 1, 1979.[10] Accordingly, the decision of the district court is hereby reversed, and the petitions at bar are remanded to the bankruptcy court for further proceedings in accordance with this opinion.

---

[9] "[F]or the letter killeth but the spirit giveth life." 2 Corinthians 3.6.

[10] Because of our conclusion that the repeal of § 1087-3 of Title 20 U.S.C. was a mistake, we need not reach appellant's other contentions to the effect that (1) its cause of action is saved by 1 U.S.C. § 109 and (2) the law applicable to this action is that in effect on the date the petitions in bankruptcy were filed.

ORDER OF JUDGE JOHN T. CURTIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter of

PAUL R. ADAMO	B-78-1032	Civ-79-344
BARBARA ANN BARRINGTON	B-77-2795	Civ-79-341
RAYMOND A. BRIMACOMB	B-78-1599	Civ-79-350
MICHAEL S. DEMPSEY	B-78-18	Civ-79-342
PAUL M. GAGNON	B-78-1974	Civ-79-353
ELOISE HYMES	B-78-1209	Civ-79-347
PAMELA R. JURICH	B-77-3174	Civ-79-354
LEOMIA R. LINTON	B-78-1435	Civ-79-349
KENNETH W. LOCEY, JR.	B-78-933	Civ-79-343
DEBORAH PETERS MANCUSO	B-78-1349	Civ-79-348
DIANE K. MAYO	B-77-2661	Civ-79-340
DENISE K. MUNNINGS	B-78-1164	Civ-79-346
KAREN NIELSEN	B-78-1898	Civ-79-351
CHANDOS C. WILLIAMS	B-78-1128	Civ-79-360
JOAN L. WILLIAMS	B-78-1129	Civ-79-345
RAYMOND T. WRIGHT, JR.	B-78-1962	Civ-79-352
MARCIA LEE CHRISTOPHER	B-78-2184	Civ-79-356
PHILLIP LEE NORTON	B-78-2405	Civ-79-359
DONALD J. SALAMONE	B-78-2273	Civ-79-357
KAREN STANLEY	B-78-2296	Civ-79-358
WILLIAM M. EDWARDS	B-78-1082	Civ-79-355

Bankrupts

Docket No. 79-5059

NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Plaintiff

v.

ABOVE NAMED,

Defendants

Order of Judge John T. Curtin

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Plaintiff

v.

PAUL R. ADAMO, et al.,

Defendants

Civ-79-344, et al.
(B-78-1032, et al.)

A certified copy of the mandate of the United States Court of Appeals for the Second Circuit dated April 16, 1980, having been filed in the office of the Clerk of this court on May 13, 1980, it is hereby

ORDERED, ADJUDGED AND DECREED that said mandate be, and hereby is, made the judgment of this court.

/s/ JOHN T. CURTIN
John T. Curtin
Chief United States
District Judge

Dated: May 13, 1980